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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 1131

THE FRANKLIN LIFE INSURANCE COMPANY,
an Illinois corporation,
Petitioner and Plaintiff,

v.

WILLIAM J. CHAMPION AND COMPANY,
a Michigan corporation,
Respondent and Defendant.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit docket No. 15,753, entered in the above case on August 27, 1965, rehearing thereof being denied on December 22, 1965.

CITATIONS TO OPINIONS BELOW

The Findings of Fact and Conclusions of Law filed May 24, 1963 (R. 346a), the Order Amending and Supplementing Findings of Fact entered October 8, 1963 (R. 364a) and the Memorandum Decision and Order Denying Plaintiff's Motion for New Trial entered October 8, 1963 (R. 365a) of the United States District Court for the Eastern District of Michigan are not reported.

The opinion of the Court of Appeals for the Sixth Circuit, filed August 27, 1965, printed in Appendix A hereto, *infra,* p. 17 is reported in 350 Federal 2d 115. The opinion denying Petition for Rehearing, filed December 22, 1965, is printed in Appendix A hereto, *infra,* p. 45 and is reported in 353 Federal 2d 919.

JURISDICTION

The judgment of the Court of Appeals was entered on August 27, 1965. Appendix A hereto, *infra,* p. 44.

The order of the Court of Appeals denying Petition for Rehearing was entered on December 22, 1965. Appendix A hereto, *infra,* p. 50.

The jurisdiction of this Court is invoked under 28 USCA Section 1254 (1).

QUESTION PRESENTED

In a non jury action to rescind a contract of life insurance because of material misrepresentations made regarding the health of the insured in an application to reinstate said contract after it had lapsed for non-payment of premium, petitioner offered testimony of two physicians to show that said insured was not in good health as was represented in said application, and that insured's health was such that he had reason to believe and must have known, both at the time that he prepared said application and thereafter that he was not in good health. The District Court refused to permit the testimony of said physicians because as to such physicians Respondent invoked the Michigan physician-patient communications privilege. A third physician, who examined insured but failed to diagnose insured's real ailment, a malignant brain tumor, was permitted to testify because as to this physician and this physician only said statutory privilege was waived. Testimony was also received from a fourth physician as to matters not within this scope of the physician-patient privilege statute and, therefore, not of concern in the instant petition. Respondent, the beneficiary under said policy, produced a number of lay witnesses who testified as to insured's apparent "good" health, both at the time the reinstatement application was prepared and thereafter. Based upon such testimony of record, which presented only one side of the coin, the District Court found that neither Mr. Champion, the insured, nor Respondent, ". . . had reason to believe that Mr. Champion was not generally in good health . . ." (Finding of Fact number 11, as amended, R. 364a). The Court of Appeals affirmed.

The question presented is: Whether a state statute, such as the physician-patient privileged communication statutes found in a majority of the states including the State of Michigan, which permits a party to litigation to control the admissibility of evidence on a vital point in issue and thereby deny to the other party the opportunity to present evidence and be heard thereon, violates the due process and equal protection clauses of the Fourteenth Amendment of the Federal Constitution?

STATUTORY AND CONSTITUTIONAL PROVISIONS CITED AND QUOTED

Constitution of the United States:

AMENDMENT XIV.—CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION:

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law nor deny to any person within its jurisdiction the equal protection of the laws.

* * * * *

Michigan Statutes Annotated:

§27A.2157 Physician-patient privilege; waiver.

Sec 2157

No person duly authorized to practice medicine or surgery shall be allowed to disclose any informa-

tion which he may have acquired in attending any patient in his professional character, and which information was necessary to enable him to prescribe for such patient as a physician. or to do any act for him as a surgeon: Provided, however, That in case such patient shall bring an action against any defendant to recover for any personal injuries or for any malpractice, if such plaintiff shall produce any physician as a witness in his own behalf, who has treated him for such injury, or for any disease or condition, with reference to which such malpractice is alleged, he shall be deemed to have waived the privilege hereinbefore provided for, as to any or all other physicians, who may have treated him for such injuries, disease or condition: Provided further, That after the decease of such patient, in a contest upon the question of admitting the will of such patient to probate, the heirs at law of such patient whether proponents or contestants of his will, shall be deemed to be personal representatives of such deceased patient for the purpose of waiving the privilege hereinbefore created. (CL '48, §600.-2157.)

STATEMENT OF THE CASE

An action was filed in the District Court by petitioner on April 3, 1961, to rescind the reinstatement of a life insurance policy that had lapsed for non-payment of premium (R. 3a). Jurisdiction of the District Court was founded upon diversity of citizenship and the amount in controversy (R. 351a). In said application which bears the date August 4, 1960, Respondent, beneficiary under said policy, represented that William J. Champion, Jr., the insured, was in good health (R. 378a). Petitioner, in reliance upon said application and information received from insured's physician, Dr. Nelson Taylor, which indi-

cated that no organic pathology had been found upon insured's request for a complete examination, approved said application for reinstatement on August 30, 1960 (R. 347a).

On September 2, 1960, insured was admitted to St. John Hospital where he was interviewed by an intern, Dr. Robert Stanton, who obtained from insured the history of his ailment and symptoms (R. 64a, 185a-189a). On September 4, 1960, insured was transferred to Grace Hospital while in a semi-conscious condition (R. 67a), 348a). Upon arrival at Grace Hospital, the admitting physician, Dr. Henry Barsch, found it necessary to obtain most of the admission history from Mrs. Champion, insured's wife (R. 55a). On September 8, 1960, a 58 gram malignant meningioma (brain tumor) was removed from insured's right posterior parieto-occipital area. Re-operation took place on November 21, 1960, when another tumor, 70 grams in size, was removed from the same area (R. 391a). Despite this operative procedure, insured expired on March 30, 1961 (R. 349a).

During pretrial discovery, the medical records were made available to Petitioner. At trial, one of the critical issues was whether insured, at the time that the reinstatement application was prepared and during pendency of said application, had reason to believe that he was not generally in good health.

In order to meet this issue, Petitioner at trial offered the testimony of Drs. Stanton and Barsch. By Dr. Stanton, Petitioner attempted to show that upon entering St. John Hospital insured advised Dr. Stanton that about five weeks before (in late July) he developed fairly continuous sub-occipital and bi-frontal headaches with nausea and vomiting; that he continued to work but noticed that he staggered to the left side causing him to bump into ob-

jects on that side; that the had diplopia (double vision) which he corrected by closing his right eye, and that he experienced dizziness (R. 191a).

Before Dr. Stanton could testify to these material facts, Respondent elected to rely upon the Michigan physician-patient privilege communications statute, and objected to the admissibility of any such communications. The District Court, after hearing argument as to whether an intern such as Dr. Stanton was included within the scope of said statute, sustained Respondent's objection. Such testimony therefore did not become evidence of record (R. 189a-190a).

Dr. Barsch was prepared to testify that he obtained information from insured and insured's wife on September 5, 1960 to the effect that early in May of 1960 (some 3 months prior to the application for reinstatement) insured noticed a decrease in his visual acuity, that shortly thereafter he had intermittent bouts of double vision, some blurring of vision, and developed severe generalized headaches, that there was no improvement of the headaches, that he saw an optometrist early in July because his field of vision had deteriorated markedly over a two month period, that shortly after this he began having difficulty driving and would frequently wander while on the road, that he began having difficulty with dizziness, that his headaches persisted, that about three weeks prior to his admission to Grace Hospital his cemory deteriorated and that he would occasionally stagger at home and bump into things (R. 360a).

As in the case of Dr. Stanton, Respondent relied upon the Michigan physician-patient privilege statute to keep such testimony from the trier of fact (R. 54a). No offer of proof as to Dr. Barsch was made as such testimony would have been cumulative to that of Dr. Stanton. As to

the third physician, who possessed no personal knowledge as to insured's true condition, Respondent interposed no objection, thereby waiving the privilege (R. 223a-229a). A fourth physician was permitted to testify only as to matters not within the scope of this privilege (R. 123a-132a).

Respondent presented lay testimony of family friends, acquaintances and present and former employees of Respondent, tending to show that insured had no reason to believe that he was not generally in good health. Such testimony indicated that during the critical period from the date of the reinstatement application until its approval insured was the sole owner and manager of a small real estate brokerage company (R. 37a), was a vigorous, apparently healthy man, who did not miss a single day from his work on account of illness until August 31, 1960, when he went home at noon with a severe headache (R. 150a, 152a, 283a, 322a, 75b, 45a), that he was an ardent swimmer and one afternoon swam 70 lengths of an olympic-size swimming pool (317a), that he cared for approximately 2½ acres of grounds surrounding his house and did his own gardening (R. 92a), that he painted the entire rear of his large house (R. 90a), that he played games which required alertness, agility and good vision, that he washed his car, played tetherball and badminton (R. 293a-294a), that he conducted sales meetings (R. 327a), handled advertising, appraised properties, supervised 15 sales people (R. 4b), wrote many checks (R. 311a), actively participated in a drive to raise funds for his church (R. 94a), attended parties, dined out and with his wife were guests in homes of friends (R. 93a), danced, drank (R. 310a, 311a), and was in general in his usual state of excellent health (R. 294a).

On the basis of evidence of record, the District Court, without the benefit of the excluded testimony, found that neither Mr. Champion, the insured, nor the Respondent had reason to believe that insured was not generally in good health (R. 364a), and concluded as a matter of law that Petitioner ". . . failed to establish by a clear preponderance of material evidence, misrepresentation of material facts" (R. 352a).

On May 24, 1963, Judgment in the sum of $93,084.86, with interest from March 30, 1961, was entered in favor of Respondent on its Counterclaim for payment under the life insurance policy in question (R. 355a). The Court of Appeals affirmed.

REASONS FOR GRANTING WRIT

Petitioner believes that any statute, which permits a party to litigation, rather than a court, to control the admissibility of evidence, so as to enable such party litigant to manipulate the introduction of evidence and thereby suppress evidence that is vital to a proper determination of the issues being litigated, is fundamentally unfair and contrary to traditional notions of fair play in violation of the due process and equal protection clauses of the Fourteenth Amendment to the Federal Constitution. Such statutes present a serious obstacle to the administration of justice. If the integrity of our adversary system of justice is to be maintained, it is absolutely necessary for this Court to declare that such statutes are in violation of the Federal Constitution.

A majority of the states have enacted legislation creating a privileged communication between physician and

patient. Appendix B, *infra*, p. 51. Such statutes have often been criticized by legal writers. Appendix C, *infra*, p. 53. A search of authorities revealed that no court has undertaken the task of examining in depth the constitutionality of such statutes. The Supreme Court of Mississippi, which has considered the issue, rather summarily denied the claim of invalidity under the Federal Constitution on the ground that such a privilege statute does not affect the substantial rights and obligations of the parties litigant but only affects the competency of certain witnesses. *Yazoo & M. V. R. Co. v. Decker*, 150 Miss. 621, 116 So. 287 (1928).

The instant case clearly demonstrates the error of such reasoning, as there can be no doubt that the substantial rights and obligations of Petitioner were affected by the exclusion of evidence which would show that insured knew or must have known that he was not in good health at the time that the reinstatement application was prepared and thereafter until its approval some two days before insured entered the hospital with a terminal illness. Petitioner submits that any statute that permits a party litigant to suppress evidence so that only one side of the proverbial coin is before the Court for consideration on one of the main points in issue quite obviously affects the substantial rights and obligations of the parties litigant.

The District Court in this case made a Finding that the insured's answer on his application was made in good faith, and that he had no reasonable ground to suspect that he was not in good health. This goes to the very heart of the case. Had the trial court not been denied the medical history at the time of hospital admissions, the record then would have contained convincing evidence that Mr. Champion must have known that his condition was not normal and that his general state of health was different than it had been in the past.

Further, exclusion of this evidence denied Petitioner the opportunity to impeach the testimony of Mrs. Champion at the trial to the effect that her husband was in good health at the time he made application to have his policy reinstated.

History reveals that communications between a physician and patient were not privileged at common law. To this day, in England there is no privilege between physician and patient. This common law rule would probably still be the law in the United States but for the fact that in 1828 the State of New York adopted a novel statute, establishing a physician-patient "privilege". Thereafter, thirty-two jurisdictions, including Michigan, adopted similar acts. Though the Commssion on Revision of the Statutes of New York studied the necessity for such legislation, its report leaves some question as to whether the statute was designed to enable patients to freely disclose their ailments to their physicians without fear that the information so disclosed might later be revealed in a court of law, or to preserve the physician's honor by not requiring him to disclose such information in court when he might feel compelled by his Hippocratic oath to remain silent. *Wigmore on Evidence* (3rd Ed) Section 2380.

Reliance, if any, by said Revisors upon the latter ground was definitely misplaced as the Hippocratic oath merely admonishes physicians to abstain from gossiping generally. Reliance upon the ground that the privilege encourages patients to freely disclose their ills is equally misplaced. Such encouragement presupposes that the patient has knowledge of the privilege and its effect. Few patients are even aware of the existence of such legislation and even fewer possess knowledge as to its legal effect. Neverthelss, those patients, who are completely ignorant insofar as the

privilege is concerned, freely disclose their ills to their physician.

> "We can all agree that it is a misfortune when a lawsuit is won by the party who would lose it if all the facts were known, and that we increase the risk of such a miscarriage of justice whenever we allow an important witness to keep any helpful facts away from the judge * * * Courtroom secrecy must produce a public good which more than offsets the risks resulting from the concealment of truth. * * * Not a single New England state allows the doctor to keep silent on the witness stand. Is there evidence that any ill or injured person in New England has ever stayed from a doctor's office on that account? * * * Legislatures and courts have been occupied for over a century in closing the physician's mouth in the very place where the truth is badly needed."—*"Is Justice Served or Obstructed by Closing the Doctor's Mouth on the Witness Stand?" Zechariah Chafee, Jr.—The Yale Law Journal,* Vol. 52, p. 607.

The advantage of a statute must outweigh the harm or injustice which results from its application, otherwise there is no valid reason for such a statute. Accumulated experience of many decades has shown that the physician-patient privilege has accomplished little more than concealment and suppression of the truth. The conjectural social policy behind such privilege statutes is completely overborne by the injustice which too often results from their supression of relevant and often decisive evidence.

> * * * "In the administration of justice, the State's purpose is, presumably, to ascertain the truth between parties and dispense justice on that basis. * * * It seems paradoxical that a system devised for the ascertainment of truth should embody rules expressly framed to conceal it, yet every privilege

> that allows a witness to stand mute is such a rule. * * * The burden of proof seems to be upon those who support a rule designed to suppress the truth that the Court is seeking. That burden can only be sustained by showing that in a jurisdiction where the rule does not obtain the relation between patient and physician is less regarded, that greater injustice prevails in this respect, and that confidence is more often disclosed. A party should not be permitted to suppress in evidence what is no secret outside the courtroom."—*"An Abused Privilege", W. A. Purrington,* 6 Columbia Law Review 388.

This is not an isolated abuse born of the facts of this particular case. The abuse found in the statute repeats itself in every case where it becomes important to prove that the insured had, prior to his application, been under medical treatment.

> "The statutes permit the holder of the privilege to use the testimony of his physician if the evidence will strengthen his case and to exclude it when offered by his opponent if it weakens his case. The monstrous injustice of such a situation is obvious". —"Physician-Patient Privilege in Ohio". 8 Clev-Mar. L. Rev. 444.

This Court has held that segregation in public education is not reasonably related to any proper governmental objective. *Boling v. Sharpe* (1954) 347 US 497, 98 L. ed. 884, 887, 74 S. Ct. 693. Likewise, suppression of relevant and often decisive evidence at the election of a party litigant is not a proper governmental objective. Petitioner submits that the privilege is unnecessary but that should such a statute be deemed necessary, control over evidence should be placed with the court and not with a party litigant.

Privilege statutes, and the Michigan physician-patient privilege statute in particular, unfairly and invidiously dis-

criminate in favor of litigants holding said privilege. There is simply no rational basis for such arbitrary discrimination. Under the Michigan privilege statute, which was invoked by Respondent herein at the trial of the instant case, it is significant to note that a waiver as to one physician is not a waiver as to any other physician. *Slater v. Sorge* (Mich. 1911) 166 Mich 173, 131 NW 565. Even extra judicial publication of privileged mattter is not considered a waiver. *Breisenmeister v. Supreme Lodge of Knights of Pythias of the World* (Mich, 1890) 81 Mich 525, 45 NW 977. *Polish Roman Catholic Union v. Palen* (Mich. 1942) 302 Mich. 557, 5 NW(2) 463. Thus, we have the anomaly that privileged matters can be disclosed prior to trial without fear as the court house door will, nevertheless, remain closed to such matters should an attempt be made, as in the instant case, to present them to the court at the time of trial. It is also of interest that there can be no contractual waiver in an application for an insurance policy. *Gilchrist v. Mystic Workers of the World* (Mich. 1917) 196 Mich 247, 163 NW 10.

It is a tradition of Anglo-American jurisprudence that both sides of the coin be presented and fully considered by the trier of fact. The due process clause of the Fourteenth Amendment to the Federal Constitution forbids "fundamental unfairness in the use of evidence". *Blackburn v. Alabama* (1960) 361 US 199, 206, 4 L. ed. 2d 242, 248, 80 S. Ct. 274, and requires that state statutes not "offend traditional notions of fair play and substantial justice". *International Shoe Co. v. Washington* (1945) 326 US 310, 90 L. ed. 95, 102, 66 S. Ct. 154. Petitioner submits that the denial to Petitioner of the right to introduce the testimony of Doctors Stanton and Barsch in the instant case was fundamentally unfair, offended the traditional notions of fair play and has denied substantial justice to Petitioner, all in

violation of the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution.

Petitioner wishes to draw attention to the following quotation found in *Wigmore on Evidence* (McNaughton Edition) Section 2389 at page 859:

> "Certainly it is a spectacle fit to increase the layman's traditional contempt for the chicanery of the law when a plaintiff describes at length to the jury in a crowded courtroom the details of his supposed ailment and then is permitted to suppress the available proof of his falsities by asserting that he wishes to keep the matter confidential."

The most cogent judicial argument in opposition to the rule is to be found in *Maine v. Maryland Casualty Co.*, 172 Wisconsin 350, 178 NW 749 (1920) in which in a dissenting opinion it was said:

> "The rule did not obtain at common law. It had its origin in the State of New York, and has been adopted by approximately one-half of the states of this country. It is said that it was enacted for the purpose of encouraging patients to disclose fully their ailments to their attending physicians without apprehension that their statements so made could be disclosed upon the witness stand to their humiliation and disgrace. As compared with the innumerable ailments to which the human flesh is heir, those which bring shame or disgrace to the sufferer are inconsiderable. Of those so afflicted who consult physicians but an inconsequential proportion are restrained from complete disclosure by apprehension of enforced publicity of shameful secrets. When we realize that but an insignificant segment of society requires protection of this nature, well may we wonder whether the shield designed for their benefit should be made so broad

> and ample as to constitute an insuperable barrier to the attainment of justice by the heirs and representatives of those who do not need such protection. * * *
>
> Taking society as a whole, this statute cheats rather than promotes justice. It suppresses rather than reveals truth." * * *

It can be anticipated that there will be resistance to the overthrow of a statute which has been in force for many years and been virtually unchallenged, but we welcome this opportunity to challenge a statute which permits a party litigant to control the admissibility of evidence at his whim and thereby suppress the truth. A decisive judicial decision is required to correct this injustice. We sincerely trust that this Court will undertake to render such a decision.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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March 9, 1966.

APPENDIX "A"

OPINION OF COURT OF APPEALS

(Filed August 27, 1965)

No. 15753

UNITED STATES COURT OF APPEALS

For the Sixth Circuit

THE FRANKLIN LIFE INSURANCE COMPANY, an Illinois corporation, *Plaintiff-Appellant*, v. WILLIAM J. CHAMPION AND COMPANY, a Michigan corporation, *Defendant-Appellee.*	APPEAL from the District Court of the United States for the Eastern District of Michigan, Southern Division.

Decided August 27, 1965.

Before: MILLER and PHILLIPS, Circuit Judges, and McALLISTER, Senior Circuit Judge.

McALLISTER, Senior Circuit Judge. The issue in this case, involving life insurance, may be stated as follows: Whether, when an insured is asked if he is in good health at the time of reinstatement of a policy and he answers that he is, the policy, then reinstated, can be rescinded by

the insurance company when it appears that the insured was, at the time of his answer, suffering from a serious disease from which he thereafter died, but did not know, at the time, that he was suffering from such disease and did not have reason to suspect it. Upon suit on the policy, the district court found that at the time the application for reinstatement was submitted, the insured did not believe, nor did he have any reason to believe, that he was suffering from a serious disease; that the insurance company could not subsequently rescind the contract of insurance; and, accordingly, the district court entered a judgment against the insurance company for the full amount of the insurance then due. From this judgment, the insurance company appeals.

The background of this case is as follows: William J. Champion and Company, Realtors, on June 18, 1959, took out a life insurance policy on the life of William J. Champion, Jr., of Grosse Pointe Farms, Michigan, its President. The policy was in the face amount of $100,000, and was issued by The Franklin Life Insurance Company. Quarterly payments of premiums were then made until June 18, 1960, when a default occurred. The defaulted payment was not made within the grace period of one month thereafter. Subsequently, defendant tendered payment of the defaulted premium by check, which was received by the insurance company on July 30, 1960. In response to the tender, defendant was advised that the insurance had lapsed and that reinstatement would be considered upon submission of a completed application therefor. The check which had been tendered for reinstatement was retained by the insurance company. On August 4, 1960, the insurance company furnished William J. Champion and Company, the defendant-appellee, a form for application for reinstatement, and on August 10, 1960, it received from defendant-appellee, the application for reinstatement of insurance on the life of Mr. Champion, which contained the following statements in answer to certain of the company's questions:

"5. What physicians or practitioners have you consulted or been treated by during the past? (Give all dates and details.)

Answer—Dr. Nelson Taylor—Routine Checkup 1960; Dr. Al Large—For Heel Injury No. 1957."

"7. Are you now in good health? (If not, give details.)

Answer—Yes."

The application was signed by William J. Champion, Jr., and by Catherine Wood Champion, his wife, who was Vice-President of defendant company and who signed on its behalf.

Upon receiving the application for reinstatement, appellant company sent its Family Physician's Blank to Dr. Nelson Taylor, requesting that it be completed and returned. Dr. Taylor stated that he did not give Mr. Champion a complete examination on July 1, 1960, but, in reply to the insurance company's request, he filled out the form under date of August 25, 1960, and returned it to defendant. Dr. Taylor stated in the form that he had found "No organic pathology" and that an analysis of the urine, a complete blood count, a chest X-ray, and a Kahn test had negative results. Under the heading "Predominant symptoms and physical findings, including blood pressure," Dr. Taylor wrote: "Request for complete examination." Thus, the physician's statement contained no information inconsistent with the statements of the insured in the application for reinstatement.

On August 29, 1960, plaintiff insurance company received this completed medical form from Dr. Taylor. Relying upon the information contained in the application form and in the medical form, Doris Smith and Willard O'Connor, underwriters in the employ of plaintiff, approved the application for reinstatement; the policy was reinstated as of August 30, 1960; and the check which had been received on July 30, 1960, was deposited by the insurance company.

For some months prior to the time the application for reinstatement was submitted, Mr. Champion had experienced recurrent headaches and some visual difficulties. He attributed the headaches to an allergy, and his opinion was confirmed by medical advice that he received. The visual difficulties he attributed to bifocal glasses he first wore in May 1960.

On the afternoon of August 31, 1960, the day after the policy had been reinstated, Mr. Champion experienced a particularly severe and disabling headache. On September 1, 1960, he consulted Dr. Taylor and had a complete physical examination; and on September 2, 1960, he was admitted to St. John Hospital, Detroit, Michigan, for tests. The evidence shows that an appointment for a complete physical had, strangely enough, been made two months in advance. In the meantime, Dr. Taylor had gone to Europe. In any event, after the examination by Dr. Taylor on September 1, 1960, and the admission of Mr. Champion to St. John Hospital for tests on September 2, 1960, those tests indicated the existence of a lesion of the brain. Mr. Champion was transferred to Grace Hospital on September 4, 1960, and remained in that hospital until September 21, 1960; was readmitted as a patient to Grace Hospital on November 14, 1960, where he remained until January 6, 1961. Dr. Gurdjian was the attending physician. Mr. Champion was then readmitted to Grace Hospital on January 16, 1961; and remained there until January 20, 1961; was readmitted to Grace Hospital on February 21, 1961, where he remained until his death on March 30, 1961. Death was due to a malignant meningioma, whose growth had not been arrested by surgery, or by subsequent cobalt treatment.

The answer to the fifth question of the application for reinstatement, above quoted, inquiring as to what physicians had been consulted by Mr. Champion, was incomplete in that it omitted the name of Dr. James E. Coyle, whom Mr. Champion had consulted on August 4, 1960, with reference to headaches. Dr. Coyle, a specialist in diseases of

the ear, nose, and throat, gave Mr. Champion a complete ear, nose, and throat examination. His diagnosis was allergic rhinitis, an inflammation of the nose, with nasal and sinus congestion, caused by an allergy, for which the physician prescribed medicine to open the nasal passages and to relieve pain. The answer to the fifth question of the application for reinstatement was incomplete with regard to another item, in that it failed to disclose that Mr. Champion had also consulted Dr. Taylor on July 1, 1960, with reference to headaches, although he did disclose that in 1960 he had consulted Dr. Taylor, and at that time had what Mr. Champion referred to as a "routine checkup," but which Dr. Taylor refers to as an office visit for some complaint but not a complete physical examination. We are not informed as to what the "routine checkup" was for.

Mr. Champion was suffering from a malignant meningioma at the time the application for reinstatement was submitted. The existence of the disease was discovered only upon his admission to the hospital. Proof of Mr. Champion's death was submitted to plaintiff by defendant in accordance with the terms of the policy.

On March 15, 1961, two weeks prior to Mr. Champion's death, plaintiff gave notice of the rescission of the policy and rescission of reinstatement by letter delivered to William J. Champion and Company; and the insurance company tendered refund of premium payments made subsequent to the reinstatement with interest to the date of tender.

In his findings of fact, the district judge found that at the time the application for reinstatement of the life insurance policy was submitted to the insurance company, Mr. Champion made the application in good faith, and did not believe, nor did he have any reason to believe, that his headaches and visual defects were symptoms of a serious disease; that Mr. Champion continued to be active in the conduct of his business; that he personally cared for the rather extensive grounds and gardens about his house; that he personally painted a considerable portion of his large house in the summer of 1960; that on August 27,

1960, Mr. Champion, with his wife, attended the wedding and subsequent reception of his secretary's daughter. He drove to the wedding, danced, and he and his wife were among the last to leave, departing about 1:30 A.M. of August 28, 1960; and he led an active business and social life, and participated with his family in a vigorous swim meet at the Grosse Pointe Hunt Club on August 28, 1960, which he won for his team by making a very fast swim. On this day he posed for a photograph with his wife and eight children at the side of a pool. In this photograph, he is erect, smiling, and the picture and personification of vigor and good health. This was the day before the insurance company received the completed medical form from Dr. Taylor, and two days before the reinstatement of the policy.

With regard to the phrase "routine checkup," used by Mr. Champion in his answer to question 5 on the application for reinstatement of insurance, the trial court found that while the phrase might not have an accepted meaning, it suggested a consultation in which the patient had no complaint; and that the form which was completed by Dr. Taylor also failed to disclose the fact that Mr. Champion had complained of headaches. Dr. Taylor, on August 25, 1960, completed the form which he had received from the insurance company for reinstatement, noting that no predominant symptoms were observed. The insurance company received this completed form from Dr. Taylor on August 29, 1960, and reinstated the policy as of August 30, 1960. The district judge, in his findings, remarked that while plaintiff insurance company contended that the failure to disclose the headaches constituted an intentional withholding of material facts, "it was equally possible" that the headaches were not believed to be serious on July 1, 1960, and, since no organic basis for the complaint could be found, they were not regarded as symptoms of a serious character. Moreover, it appeared that Mr. Champion had arranged the appointment for a complete physical examination for September 1, 1960, and had made this appointment two months in advance; that it was not credible that such

a complete physical examination would have been put off for two months if the headaches which Mr. Champion experienced were severe and disabling; and that it was not credible that, if Mr. Champion had told his physician that they were severe and disabling, Dr. Taylor would have omitted to mention them when he completed the form for the insurance company. In conclusion, the trial court found that Mr. Champion's answer that, at the time he made the application for reinstatement, he was in good health, was made in good faith, and that he did not have any reason to believe that he was not generally in good health until the afternoon of August 31, 1960; and that plaintiff insurance company knew that, in replying to this question in the application for reinstatement, Mr. Champion could only answer to the best of his knowledge, and the insurance company could not and did not expect him to inform it of impairments of his health of which he was not aware.

The principal issue in the case is whether Mr. Champion's answer in his application for reinstatement, that he was in good health, rendered the reinstatement of the policy void. We assume that the answer was made in good faith, as the district court so found, and there was evidence to sustain the finding. There seems to be no question that at the time he was suffering from carcinoma of the brain; and the evidence supports the finding of the district court that he was completely ignorant of having the disease, and had no reasonable ground to suspect that he was not in good health.

Appellee contends that in reply to the insurance company's question in its application form of reinstatement, "Are you now in good health?", Mr. Champion's answer, "Yes," was a statement made in good faith with no reasonable cause on his part to believe that he was not in good health; that such answer was properly held by the district court to be only a representation that, in good faith, he believed that he was in good health; that such answer made in good faith, even if untrue in the narrow sense, but true in the broader sense of being honest, sincere, and not fraudulent, was not such a false statement as would avoid reinstatement of the policy.

Appellant contends that such an untrue statement is ground for rescission of the insurance contract, if it materially affected assumption of the risk by the insurer.

The general rule and weight of authority hold that the statement of an applicant for insurance that he was in good health is a representation only that he believed he was in good health. In *Bronx Savings Bank v. Weigandt*, 1 N.Y. 2d 545, the Court of Appeals of New York said:

> "A representation as to good health in an application for insurance * * * is not an affirmation of fact and does not provide a basis for rescission in the absence of proof of actual fraud."

Speaking of such representations in *Sommer v. Guardian Life Ins. Co. of America*, 281 N.Y. 508, the Court of Appeals said:

> "The applicant does not guarantee the literal truth of the statement, nor do the parties condition their contract upon the existence of good health. The representation is not part of the contract; it is a 'statement inducing the formation of the contract as distinguished from an affirmation of fact or a promise incorporated in and material to the contract.' 3 Williston on Contracts [Rev. ed.], Sec. 673; Vance on Insurance pp. 389, 390; 4 Couch, Cyclopedia of Insurance Law, Sections 824, 885. Such statements must be construed in the light of their purpose to furnish to the company information which will enable it to decide whether it shall make a contract of insurance in which the information furnished will not be incorporated as an affirmation of fact.
>
> *"The courts, both State and Federal, have generally construed statements that an applicant was in good health or free from disease as a representation only that the applicant in good faith believed and was justified in believing that his health was not impaired by any condition which would ordinarily be regarded as a 'disease.'* The representation cannot reasonably be

understood as intended to do more than convey to the company such information as the applicant might be expected to have and to give to the company assurance that the applicant has had no symptom of disease which would, ordinarily, act as a warning or notice, even to a layman, that his health might be impaired in substantial degree, and assurance that the applicant, in good faith, believes that he is in fact a well person." (Emphasis supplied.)

In *Moulor v. American Life Ins. Co.*, 111 U.S. 335, the leading case, and the most persuasive, on the subject, the court held that when a policy of insurance had been so framed as to leave room for construction, rendering it doubtful whether the parties intended the exact truth of the applicant's statements to be a condition precedent to any binding contract, the court should lean against that construction which imposes upon the assured the obligations of a warranty. The court said:

"Assuming—as in view of the finding of the jury we must assume—that the insured was, at the date of his application, or had been prior thereto, afflicted with the disease of scrofula, asthma, or consumption, the question arises whether the beneficiary may not recover, unless it appears that he had knowledge or some reason to believe when he applied for insurance, that he was or had been afflicted with either of those diseases. The Circuit Court plainly proceeded upon the ground that his knowledge or belief as to having been afflicted with the diseases specified, or some one of them, was not an essential element in the contract; in other words, if the assured ever had, in fact, any one of the diseases mentioned in his answer to the seventh question, there could be no recovery, although the jury should find from the evidence that he acted in perfect good faith, and had no reason to suspect, much less to believe or know, that he had ever been so afflicted."

The court went on to state the manner in which an insurance company could stipulate in the contract of insurance

how a statement of the insured as to good health might be construed as a warranty and binding upon him regardless of its being "untrue" in the narrow sense. The court said:

"If, upon a reasonable interpretation, such was the contract, the duty of the court is to enforce it according to its terms; for the law does not forbid parties to a contract for life insurance to stipulate that its validity shall depend upon conditions or contingencies such as the court below decided were embodied in the policy in suit. The contracts involved in *Jeffries v. Life Ins. Co.*, 22 Wall. 47, and *Aetna Life Ins. Co. v. France &c.*, 91 U.S. 510, were held to be of that kind. *But, unless clearly demanded by the established rules governing the construction of written agreements, such an interpretation ought to be avoided. In the absence of explicit, unequivocal stipulations, requiring such an interpretation, it should not be inferred that a person took a life policy with the distinct understanding that it should be void and all premiums paid thereon forfeited if at any time in the past, however remote, he was, whether conscious of the fact or not, afflicted with some one of the diseases mentioned in the question to which he was required to make a categorical answer.* If those who organize and control life insurance companies wish to exact from the applicant, as a condition precedent to a valid contract, a guaranty against the existence of diseases, of the presence of which in his system he has and can have no knowledge, and which even skillful physicians are often unable, after the most careful examination, to detect, the terms of the contract to that effect must be so clear as to exclude any other conclusion.

"In *National Bank v. Insurance Company*, 95 U.S. 673—which was a case of fire insurance, involving, among others, the question whether the statements as to the value of the property insured were warranties—it was said: 'When a policy of insurance contains contradictory provisions, or has been so framed as to leave room for construction, rendering it doubtful

whether the parties intended the exact truth of the applicant's statements to be a condition precedent to any binding contract, the court should lean against that construction which imposes upon the assured the obligation of a warranty. The company cannot justly complain of such a rule. Its attorneys, officers, or agents prepared the policy for the purpose, we shall assume, both of protecting the company against fraud, and of securing the just rights of the assured under a valid contract of insurance. It is its language which the court is invited to interpret, and it is both reasonable and just that its own words should be construed most strongly against itself.' See, also *Grace v. American Insurance Company*, 109 U.S. 278, 282. These rules of interpretation, equally applicable in cases of life insurance, forbid the conclusion that the answers to the questions in the application constituted warranties, to be literally and exactly fulfilled, as distinguished from representations which must be substantially performed in all matters material to the risk, that is, in matters which are of the essence of the contract." (Emphasis supplied.)

As to the good faith of the answers of the insured with regard to his health, the court said:

"But it is contended that if the answers of the assured are to be deemed representations only, the policy was, nevertheless, forfeited, if those representations were untrue in respect of any matters material to the risk. The argument is, that if the insured was, at the time of his application, or had been at any former period of his life, seriously or in an appreciable sense afflicted with scrofula, asthma, or consumption, his answer, without qualification, that he had never been so afflicted, being untrue, voided the policy, without reference to any knowledge or belief he had upon the subject. The soundness of this proposition could not be disputed if, as assumed, the knowledge or good faith of the insured, as to the existence of such di-

> seases, was, under the terms of the contract in suit, of no consequence whatever in determining the liability of the company. But is that assumption authorized by a proper interpretation of the two instruments constituting the contract? We think not." (*Moulor v. American Life Ins. Co., pp.* 340, 341 342 and 343.)

On the question of the answers of an applicant for life insurance to questions propounded by the insurance company and their effect upon the validity of the policy, the court, in the *Moulor* case, *supra,* went on to hold that when an applicant for life insurance was required to state categorically whether he had been afflicted with certain diseases and answered that he had not, it was reasonably clear from the clauses of the policy that the company required as a condition precedent to a valid contract nothing more than that the insured would observe good faith toward it, and make full, direct, and honest answers to all questions, without evasion or fraud, and without misrepresentation or concealment of facts, with which the court ought to be made acquainted; that, in the absence of explicit stipulations requiring such an interpretation, it should not be inferred that the insured took a life policy with the understanding that it should be void, if he was, whether conscious of the fact or not, afflicted with any of the diseases specified in the questions propounded by the company. The court declared that such a construction of the contract should be avoided unless clearly demanded by the rules governing the interpretation of written instruments. In passing upon the foregoing propositions, and stating the governing law, the court said:

> "Looking into the application upon the faith of which the policy was issued and accepted, we find much justifying the conclusion that the company did not require the insured to do more, when applying for insurance, than observe the utmost good faith, and deal fairly and honestly with it, in respect of all material facts about which inquiry is made, and as to which he has or should be presumed to have knowledge or information.

> The applicant was required to answer yes or no as to whether he had been afflicted with certain diseases. In respect of some of those diseases, particularly consumption, and diseases of the lungs, heart, and other internal organs, common experience informs us that an individual may have them in active form without at the time being conscious of the fact, and beyond the power of any one, however learned or skillful to discover. Did the company expect, when requiring categorical answers as to the existence of diseases of that character, that the applicant should answer with absolute certainty about matters of which certainty could not possibly be predicated? Did it intend to put upon him the responsibility of knowing that which, perhaps, no one, however thoroughly trained in the study of human diseases, could possibly ascertain?"

As to what is meant by true and untrue answers, the court said:

> "The entire argument in behalf of the company proceeds upon a too literal interpretation of those clauses in the policy and application which declare the contract null and void if the answers of the insured to the questions propounded to him were, in any respect, untrue. What was meant by 'true' and 'untrue' answers? In one sense, that only is true which is conformable to the actual state of things. In that sense, a statement is untrue which does not express things exactly as they are. But in another and broader sense the word 'true' is often used as a synonym of honest, sincere, not fraudulent. Looking at the clauses of the application, in connection with the policy, it is reasonably clear—certainly the contrary cannot be confidently asserted—that what the company required of the applicant, as a condition precedent to any binding contract, was, that he would observe the utmost good faith towards it, and make full, direct, and honest answers to all questions, without evasion or fraud, and without suppression, misrepresentation or concealment of facts with which

the company ought to be made acquainted; and that by so doing, and only by so doing, would he be deemed to have made 'fair and true answers.'

"* * * It was an erroneous construction of the contract to hold, as the court below did, that the company was relieved from liability if it appeared that the insured was, in fact, afflicted with the diseases, or any of them, mentioned in the charge of the court. The jury should have been instructed, so far as the matters here under examination are concerned, that the plaintiff was not precluded from recovering on the policy, unless it appeared from all the circumstances, including the nature of the diseases with which the insured was alleged to have been afflicted, that he knew, or had reason to believe, at the time of his application, that he was or had been so afflicted." pp. 343, 344, 345, 346.

In *Standard Life and Accident Ins. Co. v. Sale,* 121 Fed. 664 (C.A. 6), this court considered the *Moulor* case in the course of its opinion holding that a life insurance company may require the insured to warrant that he has never had any bodily or mental infirmity except as stated in the contract of insurance, and that he is in sound condition mentally and physically, except as therein stated. The cited case was decided on the *warranties* made by the insured. The life insurance policy there provided that "insured * * * makes the following true and complete statements, which are hereby made a part of the contract of insurance, and if any of said statements shall be untrue in any respect, then this policy shall be null and void * * * I have never had * * * any bodily or mental infirmity * * *, except as herein stated, * * * I am in sound condition mentally and physically, except as herein stated." These statements were held to be *warranties* by the insured, and *not mere representations resting on the belief of the insured.* In distinguishing this case from *Moulor v. American Life Ins. Co.,* 111 U.S. 335, the court said that with respect to the pertinent part of the opinion in the *Moulor* case, the Supreme Court was employed "in demonstrating that the

statements of the insured were not intended as a warranty of the facts, but as a warranty of the good faith of the insured in making them. The whole inquiry was determined when that result was reached. But here that question was settled by the terms of the policy, and there is no room left for the court to find, in doubtful phraseology, a meaning which may be cut down to a representation made of the honest belief of the insured. That has been done which Mr. Justice Harlan said insurers would have to do in order to lay such hard lines for the insured. 'If,' said he, 'those who organize and control life insurance companies wish to exact from the applicant, as a condition precedent to a valid contract, a guaranty against the existence of diseases, of the presence of which in his system he has and can have no knowledge, and which even skillful physicians are often unable, after the most careful examination, to detect, the terms of the contract to that effect must be so clear as to exclude any other conclusion.'" *Standard Life & Accident Ins. Co. v. Sale, supra,* p. 668.

In the instant case, contrary to *Standard Life and Accident Ins. Co. v. Sale, supra,* there is no question of a warranty before us. The original policy itself provides:

> "All statements made by the Insured or on his behalf shall, in the absence of fraud, be deemed representations and not warranties, and no such statement shall be used in defense to a claim under this Policy unless it is contained in the application and a copy of the application is attached to this Policy when issued."

There is nothing in this case which requires that answers in the application for reinstatement are to be deemed warranties. In fact there is no claim of warranty. Consequently, under the Supreme Court decision in the *Moulor* case, *supra,* the statement of Mr. Champion in the application for reinstatement that he was in good health was only a representation that he believed he was in good health and had no reasonable ground to think otherwise.

The general rule, then, is declared by the Court in *Moulor v. American Life Ins. Co.*, 111 U.S. 335, is that a policy will not be avoided by the untruthfulness of a representation made in good faith if it is possible to construe the policy so as not to make the statement an absolute repre-representation or warranty.

In 29 Am. Jur., Sec. 703, under the heading of "Insurance," the rule as to opinions expressed by an applicant which are made in good faith, but are otherwise not true, is stated as follows:

> "Expression of Opinion or Expectation.—Although false, a representation of the expectation, intention, belief, opinion, or judgment of the insured will not avoid the policy if there is no actual fraud in inducing the acceptance of the risk, or its acceptance at a lower rate of premium, and this is likewise the rule although the statement is material to the risk, if the statement is obviously of the foregoing character, since in such case the insurer is not justified in relying upon such a statement, but it is obligated to make further inquiry. There is a clear distinction between such a case and one in which the insured fraudulently and intentionally states to be true, as a matter of expectation or belief, that which he then knows to be actually untrue, or the impossibility of which is shown by the facts within his knowledge, since in such case the intent to deceive the insurer is obvious and amounts to actual fraud. Clearly, where matters of opinion or judgment are called for, answers made in good faith and without intent to deceive will not avoid the policy, although they are untrue."

In answer to the question propounded to Mr. Champion by the insurance company as to whether he was in good health, his answer, "Yes," was properly held by the district court to be an answer which was understood by the insurance company to be an answer only to the best of his

knowledge; that the answer was made in good faith; that the evidence supports the conclusion that Mr. Champion did not believe, and had no reason to believe, he had any disease or symptoms of disease; and that such answer was not ground for cancellation of the policy.

Moreover, it is to be said that in order to constitute a basis for avoiding an insurance policy on the ground of misrepresentation, the misrepresentation must have been relied upon by the insurer. *Zogg v. Bankers' Life Co. of Des Moines, Iowa*, 62 F.2d 575 (C.A. 4). If it is obvious that the insurer relied exclusively on its own independent investigation and that the insured's misrepresentations constituted not even a contributory influence, they cannot be seized upon by the insurer to avoid the policy. See *Whinfield v. Massachusetts Bonding & Ins. Co.*, 162 Wis. 1, 154 N.W. 632.

As to reliance of the insurance company in the instant case upon the representation of the insured as to his health, it appears the evidence discloses that when the representative of the "Reinstatement Section" of the insurance company received the completed application for reinstatement of the policy from Mr. Champion, he informed Mr. Champion that he could not give him a decision as to whether the policy would be reinstated; that the underwriters had requested additional information from Dr. Taylor, and that "Just as soon as we hear from him, we will notify you of our decision." Obviously, this decision, whether or not to reinstate, rested on Dr. Taylor's report, dated August 25, 1960, in which Dr. Taylor informed the insurance company with regard to the data requested from him, including laboratory findings—"Negative urine, complete blood count, chest x-ray, Kahn," and "No organic pathology." This report was received by the insurance company on August 29, 1960, and the policy was reinstated on August 30, 1960. Under these circumstances, it seems beyond question that the insurance company relied upon Dr. Taylor's medical report, including the above mentioned tests and on the fact that there was no organic pathology to report, rather than on Mr. Champion's statement that he was in good health.

We need not rest decision on the insurance company's reliance upon Dr. Taylor's medical report rather than upon Mr. Champion's innocent reply in the insurance company's reinstatement form that he was in good health, but the case, on this aspect, could be determined on this issue.

In several Michigan cases there is language stating that an insurance contract may be rescinded for an untrue statement made in good faith, or in ignorance of its falsity, if the representation materially affected assumption of the risk by the insurer. This rule, if actually applied to bona fide statements made as to "good health," would result in such statement being warranties rather than representations as to belief. Such a rule, if applied, would seem to be a hang-over from a time when such statements were construed, in favor of an insurer, as warranties by the insured. Thus, in *Hann v. National Union,* 97 Mich. 513, the court speaks of a breach of warranty based on a statement of good health made by the insured. However, in the *Hann* case, the representation of good health was made "to the best of my knowledge and belief." The court held that because of this latter statement, it was immaterial whether the insured knew of the existence of any disease. In its decision, the court referred to a Vermont case, stating:

> "In *Powers v. Life Association,* 50 Vt. 630, the jury found specially that the assured had disease of the heart at the time the application was made, but that he did not know it, and might not reasonably have been expected to know it. In the application, which was made a part of the policy, he was asked the question whether he then had or had had disease of the heart, and answered, 'No.' The application contained the same stipulation as the one in suit here,—that it should form the basis of the contract, *and be a warranty,* and, if any statement should be found untrue, the policy should be void. It was said by the court: 'If he had answered that he had no knowledge that the disease existed, the finding of the jury might affect the result.' (Emphasis supplied.)

"So in the present case, if the statement had been made without this qualification, the defendant undoubtedly would have been entitled to the charge that "it is wholly immaterial whether the applicant knew of the existence of the disease or not.' If Hann's statement may be considered as amounting to a warranty at all, it is nothing more than a warranty that, so far as his information and knowledge extended, he was in good health. Under such warranty or mere representation, whichever it may be called, in order to defeat recovery upon the policy, it would be necessary to show that the applicant knew or had reason to believe that he was not in good health at the time the application was made." (p. 518)

But *Moulor v. American Life Ins. Co.*, 111 U.S. 335, excluded any construction of an insurance contract to the effect that a bona fide statement of good health made by the insured, if afterward found contrary to the actual fact, vitiated the policy; or, that such a statement was, in effect, a warranty; and modern statutory enactments, see M.S.A. 24.12218, emphasize the fact that such a statement of good health, in order to justify a rescission, must be material. The word "warranty" is not even mentioned in the Michigan insurance statutes here relied upon by both parties. Warranties are banished, by statute, from all statements made by the insured. M.S.A. 24.14016. There is no warranty in this case, but only a representation. If such statements, or representations, as to good health are made in good faith, they are to be understood by the insurer to be only bona fide representations that the applicant is in good health according to the best of his belief and without any reasonable cause on his part to believe that he is not in good health. In such a case, this kind of statement, or representation, is to be deemed not material to the assumption of the risk.

In all cases cited by appellant to the effect that the language therein lends support to the view that an insurance contract may be rescinded for an untrue statement made in good faith or even in ignorance of its falsity if the rep-

resentation materially affected assumption of the risk by the insurer, it appears that in each case, however, the Supreme Court of Michigan carefully reviewed the facts of which the insured had knowledge, and in each case it appeared that the insured did have knowledge of conditions of his health that, in good faith, he was bound to have disclosed to the insurer.

Thus, in *National Life & Accident Ins. Co. v. Nagel,* 260 Mich. 635, where it was held that although the insured was ignorant of his true condition and made the representation in question without actual intent to deceive when he was asked whether he was in good health, and answered that he was, "but was just getting over the flu," it appeared that the insured had been under a doctor's care. When he stated that he was in good health, except that he was just getting over the flu, he did know that he had a succession of attacks of influenza, high fever, night sweats, and pain in his side, together with annoying expectoration, and that the doctor was in frequent attendance upon him for these maladies.

In *Prudential Ins. Co. v. Ashe,* 266 Mich. 667, the insured, in an application for reinstatement, stated that he was in good health and had no illness or medical treatment *since the date of issue of the policy in 1928.* It appeared that, in 1930, he was operated upon for appendicitis and, about that time, an X-ray disclosed an early parenchymal type of tuberculosis in the upper right lung with lesions fairly well arrested; that in August 1930, he was again treated for pleurisy; that in February 1932, he was treated for inflammation of the lumbar region; and that, on the 15th and 26th of March he was treated for a fistula. All of the foregoing illnesses, treatments, X-rays, and the surgical operation occurred prior to his application for reinstatement which was made on April 13, 1932, and subsequent to the original issuance of the policy in 1928. In its determination of the case, the court said that when the application for reinstatement was made and the insured stated he was in good health so far as he knew, he actually knew that he had been ill of pleurisy, that he suffered pains, that he had been

told that he had some indications of tuberculosis and had just finished treatments for lumbago and was being treated for a fistula. The court held that the foregoing constituted sufficient misrepresentation of facts to avoid the policy.

In *Manfrs. Life Ins. Co. v. Beardsley,* 365 Mich. 308, the insured's application for insurance represented that he was free from disease or symptoms of disease and in sound health; that he had never consulted or been examined or advised by any doctor; that he had never gone to a hospital, sanitorium, or asylum for any reason; that he had never had any illnesses, diseases, operations, or accidents; and that he did not use beer, wine, spirits, or other intoxicants. It appeared from the evidence that the insured had suffered for many years from severe headaches and that once or twice a year, he blacked out or fainted without apparent cause. It further appeared that in 1947 or 1948, at least seven years before the policy of insurance was issued, his parents consulted a physician who had him hospitalized for examination and observation by other doctors and that, in the Fall of 1956—about the time the policy was issued—the insured again consulted a doctor. Further evidence revealed that the insured did use intoxicants frequently and with some degree of regularity, to excess. These false statements, the court held, had a material effect upon the insurer's acceptance of the risk.

In *Ranger, Inc. v. Equitable Life Assur. Soc. of U.S.,* 196 F.2d 968 (C.A. 6), this court had occasion to pass upon a Michigan case in which the insured, in his application for insurance, had stated that he had never been treated for any disease or disturbance of the skin; that he had never been in any hospital for observation, treatment, or an operation; that he had never consulted or been treated by any physician, practitioner, or specialist during the past five years. However, the evidence disclosed that a little more than three years before the policy was issued, he had consulted a physician about a growth on his face, which had a distinctly black appearance and was changing in its characteristics and becoming larger; that the insured was

admitted to a hospital on November 30, 1943, less than six weeks before the issuance of the policy, for the removal of a mole on his face; that a surgical operation was performed upon him and the mole removed; that there was evidence that the tumor, or mole, on the patient's face was growing larger in 1943; that it was a malignant tumor in January 1947, when the policy was issued; and that the insured died of metastatic malignant melanoma on December 2, 1948. The court affirmed the judgment of the district court based on the ground that the false statement of the insured invalidated the policy.

In *Michael v. World Insurance Company,* 254 F.2d 663 (C.A. 6), after the insured died, and in a suit on the policy, the beneficiary testified that she did not tell the insurance company's agent that the insured had cancer because she "doubted that he would have given the insurance had he known it." The court held that this was a *conscious* withholding of material information from the insurer and that it relied upon the application for reinstatement by reason of it.

In all of the foregoing cases, the insured knew of diseases from which he was suffering and they were ailments which were required to be disclosed to the insurance company before the issuance of the policy. None of these cases support the proposition that a statement made by the insured that he was in good health, when he honestly believed that to be the fact, and had no reason to believe or suspect that he was not in good health, vitiates the policy of insurance when it is later discovered that he had a disease that neither he nor his physician suspected at the time he stated that he was in good health. In all of the Michigan cases, although it is said that the insured made a bona fide statement that he was in good health to the insurer, he, unquestionably, had knowledge about maladies and illnesses from which he was suffering that would reasonably lead any person, in like circumstances, to believe or suspect that he was not in good health.

In *Brayer, et al. v. John Hancock Mut. Life Ins. Co.*, 179 F.2d 925, (C.A. 2), the court held that where an insured disclosed on an application for a life insurance policy that he had been treated for gastroenteritis, but was unaware that he had pancreatitis and no mention of such disease was made on the application, a verdict should have been directed for the executors of the insured on the question of misrepresentation. Furthermore, it held that the insured is required to disclose only the information which is within his knowledge, and that if he fails to inform the insurer that he had been treated for a certain disorder when he is not even aware that such disorder exists, the insurer is not relieved of liability. In speaking for the court, Judge Charles E. Clark said:

> "It is a commonplace of insurance law that 'the insured is required to disclose only information within his knowledge, and if he fails to inform the company that he has been treated for a certain disorder when he is not even aware that such disorder exists, the company is not relieved of liability.' 1 Appleman on Insurance Law and Practice, Section 247, 1941. This is an adequate answer to the charge that the insured had misrepresented the facts by mentioning only gastroenteritis when he had been diagnosed as having gastroenteritis and pancreatitis. * * * Had the insured known, it is possible that he should still be excused for not having mentioned the pancreatitis on the application, since it is a frequently occurring incident of gastroenteritis and an applicant for insurance can hardly be expected to list every affected part of the body in mentioning an illness. As it is, we do not reach that question. On the facts as they were presented, the trial judge should have held that there was no misrepresentation in the insured's omission to mention the pancreatitis." (p. 927)

Appellant contends that when the insured stated in his application for reinstatement that the only doctors who

had treated him for the past five years were Dr. Taylor and Dr. Large, this statement was false and enabled the insurer to rescind the policy, since the insured had also consulted Dr. Coyle. However, it was established that the condition for which Mr. Champion consulted Dr. Coyle, and for which he was treated, was an allergic condition, which was not a serious ailment and not significant on the question of insurability; and that Mr. Champion's failure to disclose consultation with Dr. Coyle was not a material misrepresentation constituting ground for rescission. If the attendance of the physician was not for any ailment which tended to weaken or undermine Mr. Champion's health, his nondisclosure of the consultation was not ground for rescission.

In *Brown v. Metropolitan Life Ins. Co.*, 65 Mich. 306, 313, Mr. Justice Morse, in speaking for the court said:

> "As these questions and answers ought to be construed liberally in favor of the assured, I am of the opinion that a mere calling into a doctor's office for some medicine to relieve a temporary indisposition, not serious in its nature, could not be considered an attendance by a physician, within the meaning of this question, nor would the calling at the home by the doctor for the same purpose be so regarded. The jury should have been instructed that the attendance of the physician must have been an attendance upon the assured for some disease or ailment of importance, and not for an indisposition of a day or so, trivial in its nature, and such as all persons are liable to who are yet considered to be in sound health generally."

See also to the same effect *Bullock v. Mutual Life Ins. Co.*, 166 Mich. 240; *Wohlfeil v. Bankers Life Co.*, 296 Mich. 310; and the same conclusion applies to Mr. Champion's consultation with Dr. Taylor on July 1, 1960, with regard to his headaches. As Judge Kaess said in the district court:

"The failure to disclose the fact that Mr. Champion complained of headaches to Dr. Nelson Taylor on July 1, 1960, was not a material misrepresentation since Mr. Champion did not have reason to believe that the headaches were symptoms of a serious ailment. No organic pathology had been found. The examination had only negative results. To require Mr. Champion to have considered the headaches significant when they were not considered significant by his physician would be to impose upon him the difficult work of the underwriter. The insured is not specially equipped to determine what facts are material to the acceptance of a risk. He may be expected to answer in good faith the questions that are put to him, but not to bring an understanding of medicine beyond that of the medical profession to the problem of materiality. Had plaintiff's underwriters found the recurrence of headaches to be material even though their recurrence was not considered to be serious by physicians, the questions in the forms could have been framed to elicit information desired.

"Had they found visual difficulties to be material even though the insured believed them to be caused by bifocal glasses, the questions could have been framed to elicit the information desired. It would be a simple matter for the insurer to ask specific questions relating to the symptoms that were considered significant and eliminate the difficulties inherent in the broad question—'Are you now in good health.' This plaintiff did not do although it could hardly expect those applying for reinstatement to have mastered the significance of specific symptoms in relation to insurability."

Mr. Champion's statement in his application for reinstatement that he was in good health did not constitute a warranty or condition precedent. Such statement was a representation and, since it was made in good faith, did not vitiate the reinstatement of the policy, since it must be construed to mean only that he believed the statement to

be true and had no reasonable cause to believe the contrary. The insurance company undoubtedly knew that Mr. Champion could state only his own opinion that he had no disease and that he was conscious of no malady or condition which impaired his health. To hold otherwise would be to construe Mr. Champion's statement as a warranty of the truth, when it was no more than a bona fide representation that he believed the statement to be true. *Sommer v. Guardian Life Ins. Co. of America,* 281 N.Y. 508. Again, it is to be pointed out that the insurance was reinstated only when the insurance company received the medical report of Dr. Taylor, upon which it, obviously, relied in reinstating the policy.

With regard to Mr. Champion's statement to the insurance company that he had seen Dr. Taylor for a routine check-up on July 1, 1960, there is nothing in the evidence to indicate that this was a misrepresentation. He did see Dr. Taylor on that date because of headaches; but no organic basis for the headaches was found, and they were not regarded as of a serious character. It was at this time that Mr. Champion arranged for an appointment for a complete physical examination on September 1, 1960, two months later, and, obviously, neither Mr. Champion nor Dr. Taylor would have delayed such an examination so long if Mr. Champion's headaches had been severe and disabling. There was no evidence of any misrepresentation on the part of Mr. Champion in describing his call on Dr. Taylor on July 1, 1960, as having been made for a "routine check-up."

There was no basis for rescission on the ground that Mr. Champion had concealed any medical treatment in the application for reinstatement.

An examination of the record discloses that the district court did not err in excluding, on the ground of privilege, the records of the hospital in which Mr. Champion was a

patient when tests were made, a medical history secured, and the lesion of the brain discovered. Michigan Statutes Annotated, Section 27A.2157. *Massachusetts Mutual Ins. Co. v. Trustees,* 178 Mich. 193; *Lair v. Lair,* 355 Mich. 10; *Ranger, Inc. v. Equitable Life Assur. Soc. of U.S.*, 196 F. 2d 968 (C.A. 6). The fact that the introduction of the hospital records was sought by plaintiff insurance company to enable an intern to refresh his recollection from such records, which he had written, in order to testify as to what Mr. Champion told him of his medical history and physical condition, in no manner militates against the privilege. Moreover, it appears just as contrary to public policy, in Michigan, to let such an intern testify as to what an ill man tells him upon his entrance into a hospital while suffering from a brain lesion, as it would be to permit the patient's own physician to testify as to what he learned from him while acting in his professional capacity. There was no error in the court's exclusion of hospital records or the testimony of witnesses; and we do not find merit in appellant's claim that it has been deprived of its constitutional rights, in being denied due process of law and equal protection thereunder because of the Michigan statutory provisions relating to the physician-patient privilege.

Mr. Champion was afflicted with a fast-growing, or expanding, cancer of the brain. It has become common knowledge that cancer often does not manifest itself to the person afflicted in the beginning stages of the disease, or for a considerable time thereafter, until it suddenly affects a vital part of the body, calling for immediate treatment, and frequently resulting in death although the best of treatment is given as soon as it is discovered. It appears from the evidence that a person can have malignant meningioma, from which Mr. Champion died, without suffering headaches, and that he could suffer from headaches as a result of allergic rhinitis which was the diagnosis given by Dr. Coyle.

What can be inferred from the fact that a man who has a policy of life insurance in the amount of $100,000 allows it to lapse because of failure to make a premium payment

of only $283.24 until eight or nine days after the expiration of a grace period? Would a man with a family including his wife and eight children dependent on him, allow a policy of such a large amount on his life to lapse, if, at the time of the lapse, he knew he was suffering from a dangerous disease? What inferences could be drawn from these circumstances?

The facts and the inferences to be drawn therefrom, as well as the credibility of the witnesses, and the weight of the evidence were for the trial court to determine; and it is our conclusion that the court's findings were supported by the evidence, and that there was no error in the conduct of the trial.

In accordance with the foregoing, the judgment entered upon the comprehensive opinion of Judge Kaess is affirmed.

JUDGMENT

(Filed August 27, 1965)

Before: MILLER and PHILLIPS, Circuit Judges, and McALLISTER, Senior Circuit Judge.

Appeal from the United States District Court for the Eastern District of Michigan, Southern Division.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Michigan, Southern Division, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

It is further ordered that defendant-appellee recover from plaintiff-appellant the costs on appeal, as itemized

below, and that execution therefor issue out of said District Court.

Entered by order of the Court.
Carl W. Reuss,
Clerk.

Issued as Mandate:

Costs: Awarded to Appellee
Filing fee .....$ ——
Printing appendix ...$277.25
Total $277.25

A True Copy:
Attest:
Carl W. Reuss, Clerk

OPINION OF COURT OF APPEALS ON REHEARING

(Filed December 22, 1965)

Before: MILLER* and PHILLIPS, Circuit Judges, and McALLISTER, Senior Circuit Judge.

McALLISTER, Senior Circuit Judge. Appellant filed a petition for rehearing involving many of the questions decided by this court in its opinion. We have given consideration to the arguments advanced, and, with the exception of one point, we are of the view that none of the others call for a discussion in our determination on the petition for rehearing.

Appellant submits that the court erred in holding that "it appears just as contrary to public policy in Michigan to let an intern testify as to what an ill man tells him * * * as it would be to permit the patient's own physician to testify * * *." The exact wording of the opinion, in this regard, is "it appears just as contrary to public policy, in Michigan, to let an intern testify as to what an ill man

* The late Judge Shackleford Miller presided at the hearing of this case and concurred in the opinion heretofore filed, but was not a member of the court denying this petition for rehearing.

tells him upon his entrance to a hospital while suffering from a brain lesion, as it would be to permit the patient's own physician to testify as to what he learned from him while acting in his professional capacity."

The Michigan statute provides:

> "No person duly authorized to practice medicine or surgery shall be allowed to disclose any information which he may have acquired in attending any patient in his professional character * * *."

Appellant bases its contention on the claim that a communication made by a patient to an intern, who is not duly authorized to practice medicine or surgery, is not a privileged communication. What appellant sought to introduce was the testimony of an intern as to what Mr. Champion told him of his medical history and physical condition when the intern sought such information in order to make a record for the use of the physician or surgeon who attended Mr. Champion in a professional capacity. If the intern had not taken the medical history and statement of physical condition of Mr. Champion when he came into the hospital, suffering from a brain lesion, the attending physician or surgeon would have been obliged to do so himself.

Although the intern in question had not yet been licensed as a practicing physician, he was on "medical service" at the time; his duties under the rules of the hospital included the taking of medical histories from patients who were to undergo medical treatment or surgery; and he was acting under the direction of the attending physician and also the hospital administrator.

When Mr. Champion entered the hospital, the intern gave him a specified test, including a certain injection—not routine—of a diagnostic nature or function, directed "toward treatment." The hospital records made by the intern were offered in evidence by appellant "on the theory that the past recollection [of the intern] is recorded." The intern testified on the trial that the notes of the medical history were in his handwriting and that the record showed his signature; but he had no recollection of the case.

In any event, we place our disposition on the ground that what the patient told the intern was a privileged communication.

The trial court properly analyzed the problem, in our view, when it stated:

> "The reason for the physician-patient privilege is, as I see it, is that the physician is forbidden to testify when he obtains information by reason of his employment and the confidential communications that are given to him, or entrusted to him in a professional character and necessary to enable him to perform his duties or provide care. * * *
>
> "I think a patient in the hospital when he gives that information to an intern, he is assuming that it has the same confidential stature that it does if he gave it to his own physician. I would rather assume that when I am giving a history to an intern I am giving it in the capacity as a doctor. I would assume even this, that let's say for instance we have a phony doctor, one who is—who has by fraud obtained a certificate and might not have any medical education, and a patient goes to him. He might not be a doctor, technically or really, but the information was given to him in that capacity.
>
> "* * * I certainly would not give a history to an intern if I were to assume it didn't have some confidential—be of a complete confidential nature, because what I am telling an intern, I give to him as a doctor. I realize that that is part of his training. I assume when I go there that he is under the jurisdiction of my doctor and under the direction of my doctor. * * * And they do more than just take histories. In an emergency he would have to act, and he would have to act on the information that I gave him in the history, assuming that my own doctor wasn't there."

The court then addressed the witness, who was the intern taking Mr. Champion's statement when he entered the hospital, and who afterward became a licensed physician, as follows:

"Q. Correct, Doctor?
A. It seems correct, yes.
Q. Am I in error in any way?
A. No, I don't think so, sir."

It is true that the Supreme Court of Michigan has never ruled directly on this point. Some jurisdictions have taken the view that statutes, making communications between physicians and patients privileged, include, by implication, the attendants who are assisting or acting under the direction of the physician in his treatment of a patient, and that such an attendant is precluded from disclosing any information concerning the patient which is acquired during such treatment. Some jurisdictions hold to the contrary. But in our view, when an intern may properly be said to be the agent of the physician in taking part in the treatment of a patient, the privilege applies in the case of the intern as it would in the case of the physician on whose behalf he acts. If an intern, on medical service in a hospital, informed a patient that the patient's regular attending physician had requested the patient, through him, to give such intern all the medical information regarding himself, which would be privileged if given to the physician or surgeon himself, such information given to the intern would be equally privileged; and a statute applying to privileged communications made to a person, regularly authorized to practice medicine, would include, as privileged, such a communication made to an intern acting as the agent and on behalf of the regular attending physician. For all practical purposes, the foregoing is the same as the case before us.

Appellant refers to the statutory privileged communications between patients and their attending physicians as an absurd privilege, and quotes a dissenting opinion from the Supreme Court of Wisconsin stating that such a statute

cheats rather than promotes justice. This is one judge's view—and a view differing from that of his colleagues. The rule as to licensed physicians in Michigan is viewed as beneficent by the legislative branch. With regard to the intern "on medical service" engaged in treating the patient by injections for diagnostic purposes and taking the patient's medical history and statement of physical condition on behalf of the attending physician and for his use and help in treating the patient, the purpose of the law making privileged such communications between the patient and physician would be directly thwarted by permitting the intern to disclose what the patient had told him; and the statute would be thereby annulled.

In *Eureka-Maryland Assur. Co. v. Gray*, 121 F.2d 104, 107 (C.A.D.C.), cert. denied 314 U.S. 613, the court had occasion to pass upon the statute applicable to the District of Columbia, which was not in the exact language of the Michigan statute providing for the privilege in case of any person duly authorized to practice medicine, but rather providing that "no physician or surgeon shall be permitted * * * to disclose any information, confidential in its nature, which he shall have acquired in attending a patient in a professional capacity and which was necessary to enable him to act in that capacity, * * *."

The Court of Appeals, in an opinion by Chief Justice Groner, in that case, held that the privilege applied to an intern taking a medical history of the patient, saying:

> "The local statute is very broad. It forbids disclosure by the physician of any information obtained by him in his professional capacity. The intern is himself a physician. He is a graduate of a medical school with a doctor's degree, though, it may be, not licensed to practice his profession in the ordinary way by so holding himself out to the public. But it is common knowledge that a part of his duty is to get the medical history of the patient, and in this respect he is the attending physician. Not only this, but in

> many instances he does the work of the physician and, in other respects, relieves the physician of professional services which he would ordinarily perform. It would be straining the law to hold that disclosures made to him by the patient are not equally privileged as those made to the physician in charge."

The law making communications between a patient and a physician privileged would be of no value if an intern necessarily engaged in assisting the physician in medical service could reveal it. Where it is the policy of the law to throw its protection around knowledge gained or statements made in confidence, it will find a way to make that protection effective by bringing within its scope the testimony of those whose participation in the confidence is reasonably required. See *Wolfle v. U. S.*, 291 U.S. 7.

We reaffirm our view that the conclusion of Judge Kaess was correct; that the communication made to the intern by Mr. Champion, under the circumstances of this case, was privileged; and, in accordance with the foregoing, the petition for rehearing is denied.

ORDER DENYING REHEARING

(Filed December 22, 1965)

Before: PHILLIPS, Circuit Judge, and MCALLISTER, Senior Circuit Judge. In accordance with the opinion this day filed, the petition for rehearing is hereby denied.

Entered by order of the Court.

/s/ Carl W. Reuss
Clerk

APPENDIX "B"

MISCELLANEOUS

Physician-Patient Privilege statutes have been adopted in thirty-two states including Michigan. These states are:

Arizona. Ariz. Rev. Stat. Ann. Sec. 12-2235 (1956)
Arkansas. Ark. Stat. Ann. Sec. 28-607 (1947)
California. Deering's Code Civ. Proc. Sec. 1881 (1959)
Colorado. Colo. Rev. Stat. Sec. 153-1-7 (1953)
Hawaii. Hawaii Rev. Laws Sec. 222-20 (1955)
Idaho. Idaho Code Ann. Sec. 9-203 (1963)
Illinois. Smith-Hurd Ill. Ann. Statutes (1962) Ch. 51 (enacted 1959) Sec. 5.1.
Indiana. Burns Ind. Stat. Ann. Section 2-1714 (1946 Replacement)
Iowa. Iowa Code Ann. Section 622.10 (1950)
Kansas. Kansas Code of Civil Procedure Sec. 60-427 (approved 2/27/63, effective 1/1/64)
Kentucky. Ky. Rev. Stat. Sec. 213,200 (Supp. 1958)
Michigan. Mich. Stat. Ann. Sec. 27A.2157 (1963)
Minnesota. Minn. Stat. Ann. Sec. 595.02 (1947)
Mississippi. Miss. Code Ann. Sec. 1697 (Recomp. Vol. 2—1956)
Missouri. Vernon Ann. Mo. Stat. Sec. 491060
Montana. Mont. Rev. Codes Ann. (1947) Sec. 93-701-4
Nebraska. Neb. Rev. Stat. Sec. 25-1206
Neb. Rev. Stat. Sec. 25-1207
Nevada. Nev. Rev. Stat. Sec. 48.080 (1961)
New Mexico. N.M. Stat. Ann. Sec. 20-1-12 (1953)
New York. McKinney's Consolidated Laws of New York Ann.
North Carolina. N.C. Gen. Stat. Ann. Sec. 8-53 (Recomp. 1953)
North Dakota. N.D. Cent. Code Ann. Sec. 31-01-06 (1960)
Ohio. Baldwin's Ohio Rev. Code Sec. 2317.02

Oklahoma. Okla. Stat. Ann. tit. 12 Sec. 385
Oregon. Ore. Rev. Stat. Sec. 44.040 (1961 Repl. Parts)
Pennsylvania. Purdon's Pa. Stat. Ann. tit. 28 Sec. 328 (1962)
South Dakota. S.D. Code of 1939 Sec. 36.0101
Utah. Utah Code Ann. Sec. 78-24-8
Washington. Rev. Code of Wash. Sec. 560.060 (1956)
West Virginia. None except in Justice and Constable Courts (See Mohr v. Mohr, 119 W. Va. 253, 193 S.E. 121, 122).
Wisconsin. Wisc. Stat. Ann. Sec. 325.21 (1963 P.P.)
Wyoming. Wyo. Stat. 1957 Sec. 1-139

Eighteen states, including all of those of New England, have adhered to the English Common Law. These states are:

Alabama. None.
Alaska. None. (A former statute, Alaska Comp. Laws Sec. 58-6-6, was repealed by Ch. 101, Laws of Alaska 1962.)
Connecticut. Gen. Stat. Conn. (1958 Rev.) Sec. 52-146a; (enacted 1961, P.A. 529)
Delaware. None.
Florida. None.
Georgia. Georgia Code Ann. (1961) Sec. 38-418 (5785)
Louisiana. LSA-R.S. Sec. 15:476
Maine. None.
Maryland. None.
Massachusetts. None.
New Hampshire. None.
New Jersey. None.
Rhode Island. None.
South Carolina. None.
Tennessee. None.
Texas. None.
Vermont. None.
Virginia. Code of Virginia 1950 (1957 Repl. Vol.) Sec. 8-289.1

APPENDIX "C"

PAPERS AND LAW REVIEW ARTICLES

Danziger—"Statutes Privileging Communications Between Physicians and Patient are a Blot Upon the Law and Should Be Repealed", *Assn. of Life Ins. Counsel Proc.*, 1913-1921 LXI, 1921.

Long—"The Phsician—Patient Privilege Statutes Obstruct Justice", *XXV Insurance Counsel Journ. 224* (April 1958).

Burch—"Privileged Communications Between Physician and Patient in Missouri", 59 Missouri Medicine 1186.

Ford—"The Physician—Patient Privilege", 14 Mo. L. Rev. 277.

Chaffee—"Is Justice Served or Obstructed by Closing the Doctors Mouth on the Witness Stand". 52 Yale L. J. 607.

Peterson—"The Patient-Physician Privilege in Missouri", 20 U. of Kan. City L. Rev. 122.

Lipscomb—"Privileged Communications Statute—Sword and Shield", 16 Miss. L. J. 181.

Curd—"Privileged Communications Between Doctor and His Patient—An Anomaly of the Law", 44 W. Va. L. R. 165.

Purrington—"An Abused Privilege", 6 Col. L. Rev. 388.

Bach—"The Medico-Legal Aspect of Privileged Communications", 10 Medico-Leg. J. 33.

Morgan—"Suggested Remedy for Obstructions to Expert Testimony By Rules of Evidence", 10 U. of Chic. L. Rev. 285.

Welch—"Another Anomaly—The Patients Privilege", 13 Miss. L. J. 137.

DeWitt—"Medical Ethics and the Law: the Conflict Between Dual Allegiances", 5 Western Res. L. Rev. 5.

Louissell—"Confidentiality, Conformity and Confusion: Privileges in Federal Court Today", 31 Tul. L. Rev. 101.

Sanborn—"Physicians Privilege in Wisconsin", 1 Wis. L. R. 141 (1921).

Jacobs—"Privileged Communications Between Physician and Patient in California", 20 Calf. L. R. 302 (1932).

Garner—"Privileged Communications Between Physician and Patient", 9 So. Calif. L. Rev. 149 (1936).

Oblinger—"Privileged Communications Between Physician and Patient in Illinois", 37 Chi-Kent L. Rev. 97 (1960).

Stewart—"Physician-Patient Privilege in Ohio", 8 Clev-Mar. L. Rev. 444 (1959).

DeWitt—"Privileged Communications Between Physician and Patient", 10 Western Res. L. Rev. 488 (1959).

Schwartz—"Physician-Patient Privilege — Time for a Change", 22 JBADC 513 (1955).

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 1131

THE FRANKLIN LIFE INSURANCE COMPANY,
an Illinois corporation,
Petitioner and Plaintiff,
v.
WILLIAM J. CHAMPION AND COMPANY,
a Michigan corporation,
Respondent and Defendant.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Respondent and Defendant.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

THE MICHIGAN PHYSICIAN-PATIENT PRIVILEGED COMMUNICATION STATUTE DID NOT DEPRIVE PETITIONER OF ANY CONSTITUTIONAL RIGHT

In its petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth

Circuit in the above entitled action, Petitioner claims that it was prevented at the trial of the case from introducing certain "testimony," which Petitioner claims would have helped its case, because Respondent invoked *Michigan Statutes Annotated,* Section 27A.2157, thereby preventing the admitting physician from "testifying" to what the insured told him when the insured was admitted to a hospital. Petitioner says that this statute, and other similar statutes which create a privileged communication between physician and patient, is fundamentally unfair and contrary to traditional notions of fair play. Therefore, it claims Petitioner's constitutional rights were violated contrary to the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States. We shall consider subsequently the nature of the alleged "testimony" so excluded, but first we shall address ourselves to Petitioner's argument that it was deprived of its constitutional rights by this statute.

Physician-patient privileged communication statutes have been adopted in 32 states, including all or substantially all, of the principal industrial and commercial states of this country. See Appendix "B" to the petition for writ of certiorari. If Petitioner is correct in its contention, then all of these statutes must fall. It follows logically that all other exclusionary rules, whether statutory or common law, which create privileged communications must likewise fall as unconstitutional. Therefore, if Petitioner's position is sustained, we will see the end, on constitutional grounds, of the attorney-client privilege, the priest-penitent privilege, and the privilege of one spouse not to testify against another. The thousands of decisions, both federal and state, construing and applying such statutes and rules will all be swept away. Indeed, if, as Petitioner contends a litigant has a constitutional right to bring before the trier of

the facts all evidence which might be helpful to his case, what will become of even such old standbys as the hearsay rule? All exclusionary rules of evidence necessarily keep out something which, on the basis of fairness, might perhaps ought to be heard in order to arrive at the truth of the matter. If Petitioner prevails, it will certainly simplify the law of evidence.

There would seem to be no doubt as to the constitutionality of the Michigan physician-patient privileged communication statute. It is a rule of evidence, and rules of evidence, being procedural in their nature, are peculiarly discretionary with the law-making authority. *Salsburg v. State of Maryland,* 346 U.S. 545, 98 L. Ed. 281 (1954). So far as the Federal Constitution is concerned, it "is within the acknowledged power of every legislature to prescribe the evidence which shall be received * * * in the courts of its own government." *Fong Yue Ting v. U.S.,* 149 U.S. 698, 729, 37 L. Ed. 905, 918 (1893). Privileged communications statutes have been attacked before on constitutional grounds and have been uniformly upheld. In *Cady v. State,* 198 Ga. 99, 31 S.E. (2d) 38 (1944), a Georgia statute declaring husband and wife incompetent to testify for or against each other in a criminal proceeding was held not invalid as unreasonable or contrary to public policy nor as violating the due process of law or equal protection of law clauses of the state constitution and of the Fourteenth Amendment. This Court denied certiorari. 323 U.S. 676, 89 L. Ed. 549. See also *Melton v. State,* 180 Ga. 104, 178 S.E. 447 (1935), upholding the same statute against constitutional attack. In *Ex parte Sparrow,* 14, F.R.D. 351 (D.C. Ala., 1953), an Alabama statute granting a privilege against disclosure of the sources of information, obtained by a newspaper employee and published in a newspaper, was held not to be unconstitutional in violation of the Fourteenth Amendment.

Petitioner's claim is simply that the Michigan physician-patient privileged communication statute is unfair because it kept out of evidence some "testimony" which Petitioner says would have helped its case. Petitioner does not even claim that the statute is discriminatory as against it, and it is obvious that no such claim could be made because the statute applies equally with respect to all litigants and in all kinds of cases. Even assuming, which we do not admit, that the application of the Michigan statute worked a hardship on Petitioner in this particular case, the fact that a rule of law may in certain instances work a hardship does not violate due process of law, provided it operates without any discrimination and in like manner against all persons of a class. *People's Wayne County Bank v. Wolverine Box Company,* 250 Mich. 273, 230 N.W. 170 (1930). In innumerable cases in the normal course of litigation, absence of or inability to secure witnesses may render the presentation of a complete defense impossible. Rules of evidence and procedure may work a hardship under certain circumstances, but that fact alone does not render them unconstitutional if they further justice in the general course of their operation. *People's Wayne County Bank v. Wolverine Box Company, supra.*

The remainder of Petitioner's argument consists of an attack on the physician-patient privilege on the ground that it does not accomplish the purpose for which it is designed and is unnecessary. In support of this argument it cites a dissenting opinion of a Wisconsin judge and several articles by text writers. "These are considerations that may very properly be addressed to the legislature, but not to the judiciary—they go to the expediency of the law, and not to its constitutionality." *Sears v. Cottrell,* 5 Mich. 251, at 254 (1858).

IF PETITIONER IS CORRECT IN ITS CONTENTION THAT ITS CONSTITUTIONAL RIGHTS WERE VIOLATED BY EXCLUDING THE EVIDENCE IN QUESTION, THEN, ON THE SAME REASONING, RESPONDENT WOULD HAVE BEEN DEPRIVED OF ITS CONSTITUTIONAL RIGHTS IF SAME HAD BEEN RECEIVED

What is this "testimony" which Petitioner claims it was entitled, as a matter of constitutional right, to have admitted into evidence? For one who bases its claim on "fairness and traditional notions of fair play," it would seem that Petitioner has been less than candid with this Court in saying (page 7 of petition for writ of certiorari) that "before Dr. Stanton could testify to these material facts" his testimony was objected to and did not become evidence of record. The fact is, however, that Dr. Stanton was not prevented from "testifying" to anything. He had no personal knowledge, did not recall the admission of Mr. Champion to St. John Hospital, and his recollection was not refreshed by a reading of his admitting notes. (R. 186a-187a) This being the case, Petitioner then tried to introduce into evidence the doctor's admitting notes, on the theory that same constituted past recollection recorded and was therefore an exception to the hearsay rule. They were objected to and excluded on the basis of the Michigan privileged communication statute, but the trial court accepted an offer of proof of such notes. (R. 25b-26b) So if Petitioner should prevail in its contentions, and this Court were to strike down the Michigan privileged communication statute, there would then be received into evidence the notes taken by the doctor of what the insured supposedly told him when the insured, seriously ill at the time and deceased when the

case was tried, was admitted to a hospital. There would be no possibility of cross-examination, no way to test the accuracy of the doctor's recording of what the insured told him, no way of knowing whether the doctor recorded everything he was told, no means of telling if the insured even knew what he was saying (he was removed to another hospital two days later in a semi-conscious condition, R. 67a), and no way of knowing anything more about the incident than what the cold, written page discloses. Is this fair? Could not Respondent make the same argument that Petitioner does, namely, that to receive evidence without the opportunity of testing it by cross-examination is fundamentally unfair, contrary to traditional notions of fair play, and deprives Respondent of its rights under the due process and equal protection clauses of the Fourteenth Amendment? If the Michigan physician-patient privileged communication statute is unconstitutional because unfair, then is not this exception to the hearsay rule, which permits a memorandum to be received in evidence about which the author thereof has no recollection and with respect to which he cannot be cross-examined, equally unfair and therefore unconstitutional?

We disregard entirely Petitioner's claim with respect to what Dr. Barsch would have testified to. Petitioner admits (page 7 of petition for writ of certiorari) that Dr. Barsch's testimony would have been merely cumulative to that of Dr. Stanton, and for that reason no offer of proof was made by Petitioner. Also, since no offer of proof was made, we do not know, on this record, what Dr. Barsch would have testified to, if anything, Petitioner's citation to R. 360a being merely Petitioner's counsel's unsupported affidavit made in connection with Petitioner's motion for a new trial.

EVEN IF THE EVIDENCE WHICH WAS EXCLUDED BY THE MICHIGAN PHYSICIAN-PATIENT PRIVILEGED COMMUNICATION STATUTE HAD BEEN RECEIVED, IT COULD NOT HAVE CHANGED THE RESULT

As far as the Dr. Stanton memorandum is concerned, it contained nothing which could have changed the outcome of the case. All that Dr. Stanton's memorandum said, in substance, is that the insured had developed headaches some five weeks before, that he had visual difficulties, that he experienced dizziness and some nausea and vomiting, and also that he had some difficulty walking. There was abundant evidence at the trial that Mr. Champion had suffered from recurrent headaches and visual difficulties for some months, but he attributed such headaches to an allergy, which opinion was confirmed by medical advice that he received, and the visual difficulties he attributed to new bifocal glasses. (Finding of Fact No. 7; R. 347a-348a) There was also testimony that Mr. Champion had trouble walking as the result of a heel injury suffered from a fall from a ladder. (R. 323a)

None of these facts was disputed by Respondent, and, therefore, even if the excluded "testimony" had been received, it certainly would not, contrary to Petitioner's claim, have been "convincing evidence that Mr. Champion must have known that his condition was not normal and that his general state of health was different than it had been in the past." It could never have overcome the overwhelming testimony, elicited from witnesses from both sides, which established beyond doubt that during the critical period from the date of the reinstatement application until its approval, the insured was the sole owner and

manager of a small real estate brokerage company (R. 37a); was a vigorous, apparently healthy man, who did not miss a single day from his work on account of illness until August 31, 1960 when he went home with a severe headache (R. 150a, 152a, 283a, 322a 75b, 45a); that he was an ardent swimmer and swam virtually daily during the summer of 1960 (R. 93a, 293a, 304a, 316a) and one afternoon swam 70 lengths of an Olympic-size swimming pool (R.317a); that he alone cared for the extensive grounds surrounding his home and did all his own gardening (R. 92a, 93a, 268a, 269a, 292a); that he painted the entire rear of his large house (R. 90a, 270a); that he played games which required alertness, agility and good vision (R. 294a, 295a); that he washed his automobile and played tetherball and badminton (R. 293a, 55b, 94a, 304a, 305a); that he conducted sales meetings every week and discussed with his staff numerous matters relating to his real estate business (R. 88a, 89a, 276a, 277a, 284a, 327a) and handled all advertising for his business (R. 4b); that he appraised properties, listed properties for sale, attended real estate closings, and supervised the activities of 15 sales people (R. 87a, 276a, 283a, 322a, 4b); that he carried on his business correspondence in his usual manner (R. 312a, 313a, 16b); wrote many checks (R. 311a); attended church regularly and participated in a drive to raise funds for his church (R. 94a); engaged in his usual social activities (R. 93a); kept no medication in his office (R. 154a, 314a, 323a, 76b); and that on the week end immediately preceding his alleged statement to Dr. Stanton he attended a wedding and subsequent wedding reception at which he danced and mingled with the guests (R. 95a, 310a, 311a) and on the next day participated in a swimming meet which he won for his team by swimming a very fast anchor leg (R. 95a-97a, 293a, 318a, 65b-66b). On this occasion he posed for a photograph

with his family, which is Defendant's Exhibit B, R. 81b. As the Court of Appeals stated in its opinion (350 F. (2d) 115 at 119), "In this photograph, he is erect, smiling, and the picture and personification of vigor and good health."

Therefore, even if Petitioner's position on the constitutional issue had merit as an abstract proposition, this is not the proper case in which to consider such issue because, even if the excluded evidence had been received, it could have made no difference in the final outcome.

CONCLUSION

This case has been in active litigation for five years. Petitioner has had the benefit of extensive discovery and pretrial proceedings, a lengthy trial, motions after trial including motion for new trial, an appeal to the United States Court of Appeals for the Sixth Circuit, and a motion for re-hearing by that Court. Now it has applied to the court of last resort, seeking to raise a specious constitutional issue. We submit that this is a shocking example of a litigant's taking every advantage of the disparity in economic resources between the parties (in this case, a wealthy and powerful insurance company on the one hand and the insured's widow and eight children who, as the owners of Respondent, are the real parties in interest, on the other hand), and attempting to wear down its opponent by endless delay.

We pray that this groundless petition for writ of certiorari be summarily denied, and that Petitioner be heavily

mulcted in damages and costs pursuant to Rule 56(4) and Rule 57(7) of the Rules of this Court.

Respectfully submitted,

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April 12, 1966.